(24,058)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 365.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 29, 1915.

1 *I. Petition and Amended Petition.*

In the Court of Claims.

No. 22547.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED, Claimant,
v.
THE UNITED STATES.

The original petition in this case was filed June 12, 1901. Subsequently, to-wit, February 29, 1908, by leave of Court, the claimant, in lieu of said original petition, filed its amended petition, which is as follows:

Amended Petition & Exhibits "A" & "B".

Filed February 29, 1908.

To the Honorable the Court of Claims:

The above-named claimant, the said New Orleans-Belize Royal Mail and Central American Steamship Company, Limited, respectfully represents:

I.

That it is a duly incorporated company under and by virtue of the laws of the said State of Louisiana; that on the 12th day of May, 1898, your petitioner, having its principal office in the city of New Orleans aforesaid, and being the owner of the Steamship Stillwater, entered into a charter-party contract with the defendant herein, The United States, which charter-party is, in terms, as follows:

2 Articles of Agreement, entered into at Washington, D. C., this 12th day of May, eighteen hundred and ninety-eight, between Charles Bird, Major and Quartermaster, United States Army, of the first part, and New Orleans-Belize Royal Mail Steamship Company of New Orleans, of the county of Orleans, and State of Louisiana, of the second part:

This Agreement Witnesseth, that the said Charles Bird, Major and Quartermaster, U. S. Army, for and in behalf of the United States of America, and the said New Orleans-Belize Royal Mail Steamship Company, owner of the steamship called the Stillwater, of New Orleans, of the burden of 1,019 registered tons, or thereabouts, at present lying in the harbor of New Orleans, La., and commanded by H. Galt, for itself, its heirs, executors and administrators or successors, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows, viz:

I. The said New Orleans-Belize Royal Mail Steamship Company does hereby grant and let, and the said Charles Bird, Major and Quartermaster, U. S. Army, does hereby take, the steamship Stillwater for the voyage or voyages hereinafter mentioned, and for such longer time as she may be required in the military service of the United States, not to extend beyond the thirtieth day of June, eighteen hundred and ninety-eight, unless this charter shall be renewed on or before that date.

II. The said vessel shall, on the 16th day of May, eighteen hundred and ninety-eight, be ready to load and receive on board at New Orleans, La., or elsewhere, whenever tendered alongside, by the Quartermaster, United States Army, or his agent, only such troops, persons, animals, and supplies or cargo as he shall order and direct, and as the said vessel can conveniently stow and carry (reserving sufficient room for the stowage of the vessel's cables and ma-
3 terials, accommodation of the officers and crew, and, if a steam vessel, for necessary supply of coal); and when so laden shall proceed, with the first good opportunity, and without delay, from the port of New Orleans, La., or elsewhere, direct to such ports and places as ordered by the proper officer of the Quartermaster's Department, and deliver the cargo in good order and condition (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted) to the quartermaster or quartermasters, or the duly authorized agent or agents of the Quartermaster's Department, at the ports and places to which said vessel is ordered to proceed.

III. All cargo shall be received and delivered within reach of the ship's tackles.

IV. The said vessel now is, and shall be kept and maintained while in the service of the United States, tight, stanch, strong, and well and sufficiently manned, victualed, tackled, appareled, and ballasted, and furnished in every respect fit for merchant or transport service, at the cost and charge of her owner. The time lost in consequence of any deficiency in these respects, and in making repairs to said vessel not attributable to the fault of the United States or its agents, is not to be paid for by the United States.

V. All port charges and pilotage in and out of different ports, where the employment of local pilots is necessary for the safe navigation of said vessel in dangerous waters, will be paid by the United States, after leaving the port of New Orleans, La., but nothing herein shall be construed as binding the United States to pay the monthly wages of any person employed by the said New Orleans-Belize Royal Mail Steamship Company or his agent, continuously on said vessel as pilot.

VI. The war risk shall be borne by the United States; the marine risk by the owner.

4 VII. The United States will furnish all the fuel necessary to propel the vessel, if a steamer, until the said vessel is returned to the said Company at New Orleans, La., in the same order as when received, ordinary wear and tear, damage by the elements,

collision at sea and in port, bursting of boilers and breakage of machinery excepted.

VIII. For and in consideration of the faithful performance of the stipulations of this agreement, the said Company shall be paid by the Government three hundred and twenty-five dollars ($325) per day for a period of thirty (30) days from 12 o'clock noon, on May sixteenth, eighteen hundred and ninety-eight, and for each and every day thereafter that said vessel is retained in the service of the Government the compensation to be paid shall be three hundred and twenty-five dollars ($325) per day. All water for boilers and drinking purposes shall be furnished by, and all cargo shall be loaded and unloaded at the expense of, the Government.

IX. Payment shall be made at the office of the disbursing Quartermaster at New Orleans, La., in the funds furnished for the purpose by the United States, upon presenting certificates of the proper officer or agent of the Quartermaster's Department that the said vessel has faithfully performed her part of this contract.

X. The said vessel is valued and appraised at the sum of one hundred and twenty-five thousand ($125,000) dollars, and should she be retained so long in the service of the United States that the money paid and due on account of this charter or its renewals (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of 33 per cent per annum on said appraised value) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the services of the said vessel rendered under this charter or its renewals.

XI. If at any time during the continuance of this charter, or its renewals, the United States shall elect to purchase the said vessel, it shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter or its renewals (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of 33 per cent per annum on the original appraised value) shall apply on account of the said purchase.

XII. This charter shall go into effect at 12 o'clock M. of the 16th day of May, 1898.

XIII. If the said steamship Stillwater shall be in the service of the United States, under this charter, on the thirtieth day of June, eighteen hundred and ninety-eight, the United States may, at its option, renew this charter for a period not to extend beyond the end of the next fiscal year, and shall have the privilege of such renewal at the expiration of each fiscal year thereafter, if the charter is then in force.

XIV. Neither this contract nor any interest therein shall be transferred by the said New Orleans-Belize Royal Mail Steamship Company to any other party, and any such transfer shall cause the annulment of the contract, so far as the United States is concerned. All rights of action, however, to recover for any breach of this con-

tract by the said New Orleans-Belize Royal Mail Steamship Company are reserved to the United States.

XV. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract or to any benefit which may arise herefrom.

6 XVI. This contract shall be subject to approval of the Quartermaster-General, U. S. Army.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

CHAS. BIRD, [SEAL.]
Major and Quartermaster, U. S. A.
M. MACHECA, *President,* [SEAL.]
New Orleans-Belize Royal Mail and Central American Steamship Company, Limited.

Witnesses:
L. F. RANDOLPH.
C. H. WASSON.

(Executed in Quintuplicate.)

Approved: May 24, 1898.

M. I. LUDDINGTON,
Quartermaster-General, U. S. A.

Approved: May 24, 1898.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

That on or about the 16th day of May, 1898, the said vessel passed into the service of the United States, the defendant herein, by virtue of said charter party, and was continued and held in such service until on or about the 2d day of November, 1898. That at the time of the execution of said charter party the said Stillwater was commanded by Captain H. Galt, but subsequently was commanded by Captain William F. Stevenson.

That at the time said charter party was executed and said vessel put thereby, as aforesaid, into the service of the United States, she was tight, stanch, strong, and well and sufficiently manned, victualed, tackled, appareled, and ballasted, and furnished in every

7 respect fit for merchant or transport service, all as set out and agreed upon in the said charter party.

II.

That on or about the 3d day of August, 1898, the captain of said vessel (Captain Stevenson) was ordered by the officers and agents of the defendant to assist with the said Stillwater in lightering the United States auxiliary cruiser St. Paul. To which order Captain Stevenson then and there protested. That while lying alongside of the latter vessel at Arroya, Porto Rico, in obedience to said orders, the waters were rough and both vessels were rolling, and the after-

gun sponson of the St. Paul was thrown down on the said Stillwater, broke the after port boat davits, started the socket from the deck, tore up the deck, sprung the collision bulkhead, carried away the deck rail, and otherwise greatly damaged the said latter-named ship.

III.

That on or about the 4th day of August, 1898, the captain of the said Stillwater received an order in writing from the officer in command of the United States forces at Port Ponce, Porto Rico, of which the following is a copy:

HEADQUARTERS OF THE ARMY,
PORT PONCE, P. R., August 4, 1898.

To the Captain, Steamship Stillwater:

SIR: The major-general commanding directs that you proceed to the Massachusetts with twenty-five laborers, who will be furnished you at once, and load your ship from the Massachusetts, and return as near shore as possible. Your boat that is now here will be held until you return from the Massachusetts.

Very respectfully,

J. C. GILMORE,
Brigadier-General, U. S. V.

8 In obedience to said order the Stillwater proceeded to where the Massachusetts was lying fast on the rocks outside the light-house at Ponce aforesaid, and was there ordered by the naval lieutenant in charge, an officer of the United States, to make fast to the said stranded vessel and assist in pulling her off the rocks. Under these orders, and against the protest of the captain of the Stillwater, she was made fast to the Massachusetts with the bow of the Stillwater to the stern of the stranded vessel. In this position the Stillwater pulled during the night of the said 4th of August to secure the relief of the stranded ship. During this time the waters were such that the two ships rolled heavily, and the Massachusetts carried away from the Stillwater her rails and two-lines, dented and injured her plates, strained her port hinges and windlass, and otherwise greatly injured said vessel. That on the morning of the 5th of August aforesaid, the Stillwater was ordered to stop pulling on the Massachusetts, but on leaving the side of the latter vessel it occurred that one of the bulwark ports of the said Massachusetts had been carelessly and negligently left open which was not observed, the hour being half past three o'clock, and this open port broke and carried away the steering gear of your petitioner's ship. Your petitioner further says that by reason of the tugging thus done by the Stillwater for the relief of the Massachusetts, under the orders of the officers of the defendant, the said vessel, the Stillwater, was greatly strained and damaged throughout her whole structure,. including the frame of the vessel and her machinery, to her great injury.

IV.

That on or about the 26th of August, 1898, the captain of the said Stillwater was served with an order which reads as follows

9 HEADQUARTERS OF THE ARMY,
PORT PONCE, P. R., August 26, 1898.

Lieutenant-Colonel J. W. Pullman, Ponce, P. R.

SIR: The major-general commanding directs that 108,000 oats now on the Concho be transferrrd to Mississippi, for which purpose the Concho will move alongside the latter vessel. The Stillwater will take all the commissary stores from the Obdam and will so move alongside the last-named vessel.

Very respectfully,

J. C. GILMORE,
Brigadier-General, U. S. V.

Official:
H. H. WHITNEY,
Capt. and A. A. G.

In obedience to said order, but against the protest of the captain of your petitioner's said ship, she was placed alongside the said Obdam, with her starboard to the Obdam's port, where she lay from August 27 to August 31, 1898, while the cargo of the latter vessel was transferred to the former. The ships both rolled during the whole of this time and the Stillwater thumped heavily. When the latter vessel left the side of the Obdam a survey on board disclosed that she was leaking badly, rivets were gone on the starboard side, her frames were broken, deck beams sprung off and rivets torn out, angle-piece buckled, and torn from the side; the forward port sprung, and hinges damaged; seams, plates, and butts sprung, rivets started, discharge pipe from circulating pump broken, and the whole starboard side badly dented and injured—all resulting, as petitioner avers, from her being used as a lighter as here set forth.

That subsequent to the injuries to the said Stillwater, last
10 above named, the ship continued to leak and the following notice was duly served on the Captain of the Port of Ponce:

S. S. "STILLWATER,"
PONCE, PORTO RICO, October 13, 1898.

To the Captain of the Port of Ponce, Porto Rico:

This is to certify that this vessel is at this date leaking badly; she is making water at the rate of 13 (thirteen) inches per hour.

This leak we are satisfied is on account of the injuries done to her while laying alongside the U. S. transport Obdam from August 27th to 31st, at which time she received severe injuries, by starting collision bulkheads, frames, angle-pieces, rivets, &c. The leak was started whilst alongside the Obdam, and has been increasing ever since.

WM. L. CHALLONER, *1st Officer.*
WM. F. STEVENSON, *Master.*

V.

Your petitioner further states that said vessel was returned to the Port of New Orleans and to the custody of petitioner on or about the 2d day of November, 1898; and that after the injuries sustained by the Stillwater on or about the 3d day of August, 1898, while lightering the St. Paul, as above set forth, and after the injuries resulting from being used as a wrecker in connection with the Massachusetts, as aforesaid, your petitioner, on or about the 22d day of August, 1898, communicated said facts of alleged injuries, by letter, to the Quartermaster-General of the United States Army at Washington, D. C., requesting that when said transport, the Stillwater, should be turned over to your petitioner, that a qualified representative of the Government should be appointed to make a complete and th-rough examination of the said vessel for the purpose of
11 avoiding delay and difficulty in making settlement for such damages as the Government might be found responsible. And in response to said request, your petitioner states that he received the following letter:

WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON, August 30th, 1898.

Messrs. Macheca Brothers, Managers New Orleans-Belize Royal Mail Steamship Company, New Orleans, La.

SIRS: Referring to your letter of the 22d instant, stating that the captain of the steamship Stillwater reports to you that the vessel has been severely used, and asking that when the transport is turned over to you, that a qualified representative of the Government be appointed to make a complete and th-rough examination of the vessel to avoid any delay or difficulty in settlement of the same, you are respectfully informed by direction of the Quartermaster-General that Colonel J. W. Scully, Quartermaster, New Orleans, has been designated to inspect, in company with a representative of the owners, all the vessels arriving in New Orleans for cancellation of charter, and together they are to determine what is required to be done to restore the vessel to its original condition when chartered, ordinary wear and tear and marine risk excepted.

Colonel Scully is directed to notify owners of vessels of the time when inspection is to be made, in order that they may have their representative present.

The repairs found necessary to be done by the representatives of the two interested parties will be reported to this office by Colonel Scully for approval.

This method has been adopted in the discharge of a number of the chartered transports in New York City, and a very satis-
12 factory adjustment has been the result in every instance, and it is hoped that such may be the case in the cancellation of the charters of the vessels of your line.

Respectfully,

CHAS. BIRD,
Colonel and Quartermaster, U. S. Vol.

Your petitioner therefore states, that upon the receipt of said vessel from the service of the defendant on the 2d of November, 1898, or as soon thereafter as convenient, notice was duly served on said Colonel J. W. Scully, informing him that petitioner had selected as its representative to inspect said vessel, in accordance with the letter of Colonel Bird, as above set out, Captain J. A. Cotter, Supervising Inspector of Vessels, Tenth District; that soon thereafter to-wit: on or about the 11th day of November, 1898, the said vessel was put on the dry dock at Algiers near the city of New Orleans, and was inspected by said Colonel Schully and Captain Cotter. On July 1, 1900, said Colonel Scully made a report to the Quartermaster-General, U. S. Army, touching the inspection thus made by himself and Captain Cotter and the damages the said Stillwater had suffered while under charter to the defendant, copy of which report is attached hereto and marked Exhibit "A," and made a part hereof.

Petitioner further alleges that the said vessel, when so returned to it, was in such condition that it could not be repaired, nor the extent of the repairs made necessary by her said injuries be determined without placing her in dry dock.

VI.

That in addition to the inspection made of said vessel while in dry dock, by said Colonel Scully and Captain Cotter, as aforesaid, your petitioner had the same inspected throughout by Messrs.
13 Baker & Turley, Marine Surveyors, of 80¢ Gravier street, New Orleans, La., who duly reported to your petitioner the repairs made necessary by the injuries to the said ship while under charter to the defendant, as aforesaid, item by item, and thereupon petitioner proceeded to have said vessel duly repaired in accordance with the report thus made by the said Baker and Turley. That such repairs cost your petitioner the sum of nine thousand five hundred and forty-three dollars and seventy-five cents ($9,543.75).

VII.

Your petitioner also states that the captain of the Stillwater, on going said repairs so made necessary by the injuries aforesaid, from the 2d day of November, 1898, to the 14th day of December, 1898—a period of forty-two days.

VIII.

That upon the return of said vessel to petitioner on or about November 2, 1898, the inside of the same was dirty and foul from transporting horses and mules, and from other bad usage on the part of the defendant, and petitioner agreed with said Colonel Scully, Quartermaster at New Orleans, and, as petitioner believes duly authorized to make such agreement, that petitioner should be paid by the defendant the sum of five hundred dollars ($500) for cleaning the inside of said ship, which would have been a fair and just compensation.

IX.

Your petitioner also states that the captain of the Stillwater, on behalf of the owner thereof, protested to the officers and servants of the defendant when ordered to lighter the St. Paul and the
14 Obdam, and when ordered to act as a tug-boat or wrecker in the attempt to pull the Massachusetts from the rocks where she was stuck fast, alleging that such service was not agreed upon or contemplated by the charter party, or by the parties thereto; that the Stillwater was not constructed nor fitted for such service, and that to engage in it would probably injure her very greatly. But that such protests were of no avail, and Captain Stevenson, as the representative of your petitioner was compelled to yield to the orders of the military officers—all as above set forth.

X.

Your petitioner further shows the court that when the damages to said ship, Stillwater, caused by the unwarranted and illegal conduct of the defendant, were ascertained and determined, it made demand on the defendant, through said Colonel J. W. Scully, Assistant Quartermaster-General, United States Army, located at the said city of New Orleans, Louisiana, and through said Colonel Scully upon the War Department of the United States, for the payment of the amount of the same, furnishing to the defendant, through its officers and the Department, full statements of the amounts so claimed, and that in response to said demand to be so paid the said damages, your petitioner, on or about August 30, 1900, received notice from said Colonel Scully that the defendant refused to pay the same.

Petitioner, therefore, by reason of the facts herein set forth, avers that the defendant became and is indebted to it in the sum of twenty-three thousand six hundred and ninety-three dollars and seventy-five cents ($23,693.75) as per bill of particulars hereto attached and marked Exhibit "B," and made a part hereof, and therefore prays judgment against the United States for said sum; further averring that its said claim has not, nor any part of the same, nor in-
15 terest therein, been transferred or assigned by it, and that petitioner is justly entitled to said last-mentioned amount from the defendant after allowing all just credits and offsets.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED,

By J. H. McGOWAN, *Attorney for Petitioner.*

McGOWAN, SERVEN, & MOHUN, 1419 F Street N. W., Washington, D. C.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Before me, the undersigned, a notary public in and for the said District and city, personally appeared J. H. McGowan, the attorney for the claimant therein, who, being duly authorized to verify the petition, and who being duly sworn, deposes and says that he has read the foregoing petition by him subscribed, and is acquainted with the contents thereof; that the matters and things therein contained and stated are true, as he verily believes; that the claimant is justly entitled, as shown in said petition, to the moneys therein claimed to be due and owing to him from the United States, after allowing all just credits and set-offs, and that to the best of deponent's knowledge and belief no assignment or transfer of the claim therein set forth, or any part thereof, or any interest therein, has been made by the claimant to anyone whomsoever or by anyone in his behalf,

J. H. McGOWAN.

Subscribed and sworn to before me this 28th day of February, A. D. 1908.

[SEAL.] MYDDELTON WOODVILLE,
Notary Public.

16 EXHIBIT "A."

DEPOT QUARTERMASTER'S OFFICE,
1201 PRYTANIA STREET,
NEW ORLEANS, LA., July 1, 1900.

Quartermaster-General, U. S. Army, Washington, D. C.

GENERAL: Regarding the claim of the Macheca Bros. for damages done the S. S. Stillwater while in the service of the United States during the war with Spain, and to your endorsement of February 20, 1900, I have the honor to report that I have made every endeavor possible to come to a just conclusion in this matter, even to making inquiries outside of the usual methods. The "stumbling block" in my way to a prompt report of the inspection of this ship, and a recommendation, has been the letter of Lieut.-Col. J. W. Pullman, which states that "the master of the Stillwater * * * intends to make a claim for damages for a considerable amount." I questioned Captain Stevenson regarding this statement, and he denied having ever made any remarks that would convey that impression, and said that all he could do was to report to his employers. I have carefully looked into this whole matter, and report as follows: On the arrival of the Stillwater in this port on November 3, 1898, I was present, and after a brief inspection, offered Mr. Macheca five hundred dollars, the amount accepted by the Morgan line, for a quit-claim for damages. Mr. Macheca refused this, saying that the ship was badly damaged from usage outside of the terms of the charter party. The ship was then put on the dry-dock at Algiers on November 11, 1898, and I, with Captain J. A. Cotter, Supervising In-

spector of Vessels, 10th District, was there to inspect her. Captain Cotter's several statements are herewith enclosed, and my
17 memorandum of what I saw is as follows: "Bottom about center, hole about six inches long and half an inch wide, wear and tear. Starboard plates, about seventy feet must be replaced. Two streaks, port side, plates indented, not so bad. Plate where hole is is as thin as a knife blade. This ship seems to have been badly used up, and looks as if she came into collision with large vessels or wharves. Considerable inside work will have to be done on her, which is incidental to the damage to the plates from without. She was in good condition when inspected prior to charter, and is in very bad condition now. Underwriter's surveyors Messrs. Baker & Turley, are examining her, and Captain Cotter, supervising inspector, U. S., assisting me." The above synopsis gives the true condition of the vessel in dry-dock November 11, 1898. The bills were presented to me the following spring, and I had several conferences with Mr. Macheca, as to cutting out parts of the bills, but he contended then, and still contends, that had it not been for these extraordinary damages the ship would have run for two years without repairs. This statement has been confirmed by Messrs. Baker and Youngblood, U. S. inspectors, who inspected the ship just prior to her charter by the United States.

I believed my duties ended when I reported the condition of the ship on leaving and on returning to this port, and that the law and the regulations would govern in the settlement, but as I am directed to give an opinion I do so in my best judgment. I have carefully read the "opinion" of Henry C. Platt, assistant U. S. attorney, of August 24, 1898, and find nothing in it that applies to the Stillwater. There is no claim made on account of "grounding," and none for the hole in the bottom. The claim on account of "collision" is for the damage done when used as a lighter for the Obdam
18 and St. Paul, and as a "wrecker" for the Massachusetts, when she was chartered only for the purpose of carrying passengers and freight. The log of the vessel, which I have verified, shows the nature of the work she performed.

Again referring to Lieut.-Col. Pullman's letter, I would invite attention to his statement that the vessel was "able to do her work right along, in harbor and at sea, with heavy cargoes and under usual conditions of weather, good and bad," which shows that the Stillwater, when she left here, was in first-class condition, and kept so during the whole term of her service in the United States Quartermaster's Department.

Under all these circumstances, and in justice and equity, I cannot do otherwise than recommend that the whole amount of this claim be paid. There is no "lump sum," but the actual bills, as paid by the owners of this vessel, for the actual damage done, outside of ordinary wear and tear.

Very respectfully, your obedient servant,

J. W. SCULLY,
Asst. Quartermaster-General, U. S. Army.

EXHIBIT "B."

Bill of Particulars.

The United States to the New Orleans-Belize Royal Mail and Central American Steamship Company, Limited, Dr.

For injuries to the steamship Stillwater while under charter to the United States, from May 16, 1898, to November 3, 1898.

19	To paid McCan's Iron and Brass Foundry, as per bill herewith	$8,242.36
	To paid McLellan Dock Co., for docking and repairs, as per bill herewith	1,301.39
	To cleaning inside ship as per agreement with Colonel Scully	500.00
	To demurrage while ship was in dock and undergoing repairs, from November 2, 1898, to December 14, 1898, in all 42 days at $325 per day	13,650.00
	Total	$23,693.75

20 *II. Traverse. Filed March* 3, 1910.

In the Court of Claims of the United States, December Term, A. D. 1913.

No. 22547.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP CO.
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

21 *III. Argument and Submission of Case.*

On March 3, 1910, this case came on to be heard. Mr. Clarence R. Wilson was heard on behalf of the claimant. On March 8, 1910, Mr. Wilson was further heard for the claimant and Mr. Frederick DeC. Faust was heard in opposition. On March 9, 1910, Mr. Faust was heard further for the defendants, Mr. Serven replied and the the case was submitted.

22 *IV. Findings of Fact and Conclusion of Law. Filed May 2,* **1910.**

Court of Claims of the United States.

No. 22547.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the Court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a citizen of the United States, and is a corporation existing under the laws of the State of Louisiana, and engaged in conducting a general shipping and transportation business, and is the owner of the claims in question and has neither assigned nor sold them in whole or in part.

II.

During May, 1898, claimant was the owner of the Steamship Stillwater. On the 12th of May, 1898, claimant entered into a charter-party contract with the United States, which was represented by Charles Bird, Major and Quartermaster, U. S. Army, and duly approved by Quartermaster-General M. I. Luddington and Assistant Secretary of War, G. D. Meiklejohn, which is set out in full in the petition. The charter was extended on June 23, 1898, to the 30th day of June 1898, and from day to day thereafter until further notified by the Quartermaster-General. The charter was finally terminated by the United States on November 2, 1898.

23 III.

The Stillwater passed into the service of the United (States) on May 16, 1898, at which time she was tight, stanch, strong, and well and sufficiently manned, victualed, tackled, apparaled and ballasted, and furnished in every respect fit for merchant or transport service, all as set out and agreed upon in the said charter-party.

It appears that in the month of June, 1898, the steamship Breakwater collided with the Stillwater in Tampa Bay, resulting in bending the plates of the latter on the port bow.

Some three weeks thereafter while unloading horses in Daiquiri Bay, Cuba, while the wind was blowing a gale, the Stillwater was driven against the rocks injuring her propeller to an extent that it could not be controlled for several minutes. Her starboard life boat

was also damaged while towing horses ashore and in an attempt to save it the ship's davits were bent down and the boat was broken up and lost in the heavy sea.

On July 27, in Gauanica Bay, Porto Rico, the steamship La Grande Duchesse swung against the port side of the Stillwater then at anchor, crushing her port life boat, bent the davits and broke her accommodation ladder.

On August 3, 1898, the captain of the vessel, Captain Stevenson, was ordered to assist in lightering the United States auxiliary cruiser St. Paul, and he then and there protested. While lying alo-gside the St. Paul at Arroyo, Porto Rico, in obedience to said orders, the waters being rough and both vessels rolling, the after-gun
24 sponson of the St. Paul was thrown down on the Stillwater, broke the after port boat davits, starting the socket from the deck, tore up the deck, sprung the collision bulkhead, carried away the deck rail and otherwise damaged the ship.

On August 4, 1898, the captain of the Stillwater received orders directing him to proceed with twenty-five laborers furnished by the United States to load his ship, from the Massachusetts, and return as near shore as possible. In obedience to said order the Stillwater proceeded to where the Massachusetts was lying fast on the rocks outside the lighthouse at Ponce, and was there ordered by the Naval lieutenant in charge, an officer of the United States, to make fast to the stranded vessel and assist in pulling her off the rocks. Under these orders and against the protests of the captain of the Stillwater, she was made fast to the Massachusetts with the bow of the Stillwater to the stern of the stranded ship. In this position the Stillwater pulled during the night of the said 4th of August to secure the relief of the stranded ship. During this time the waters were such that the ship rolled heavily against the other vessel, and the Massachusetts carried away the Stillwater's rail and tow-lines, dented and injured her plates" strained her port hinges and windlass, and otherwise greatly injured said ship. On the morning of August 5, the Stillwater was ordered to stop pulling on the Massachuestts, and leave said ship on the reef. In leaving the side of the Massachusetts, one of her bulwark ports had been left open, which was not observed, the hour being half past three o'clock, and this open
25 port broke and carried away the steering gear of the Stillwater. Furthermore, by reason of the tugging done by the Stillwater for the relief of the Massachusetts, the Stillwater was greatly strained and damaged throughout her whole structure, including the frame of the vessel and her machinery.

On August 26, 1898, the Stillwater was ordered to take all the commissary stores from the Obdam in the harbor of Ponce, Porto Rico. In obedience to this order, but against the protest of the captain of the Stillwater, she was placed alongside the Obdam with her starboard to the Obdam's port, where she lay from August 27, to August 31, 1898, while the cargo of the latter ship was transferred to the former. The ships both rolled during the whole of this time and the Stillwater thumped heavily. When the Stillwater left the side of the Obdam a survey on board disclosed that

she was leaking badly, rivets were gone on the starboard side, her frames were broken, deck beams sprung off and rivets torn out, angle pieces buckled and torn from the side, the forward port sprung, and hinges damaged; seams, plates, and butts sprung, rivets started, discharge pipe from circulating pump broken, and the whole starboard side badly dented and injured.

On September 3 at Ponce the Spanish steamship Vasco ran into the Stillwater in the night time, striking her on the starboard side forward and laid her rail from the stem along some 30 feet.

About three weeks later the Stillwater went aground on a sand bar and a hole was afterwards found in her bottom forward which had to be replaced by a new plate.

26 In the bill rendered for the repairing of the Stillwater, it does not appear that a separate account was kept for the damages to the vessel in the several instances above referred to, but is rendered in a lump sum showing the cost of repairing in entirety.

IV.

The making of the necessary repairs to this vessel, and dockage incident thereto, deprived claimant of her use for the period of 38 days.

A reasonable allowance for the damages to said vessel while so employed in the service of the United States would be the sum of $7,532.80. Demurrage, if allowed, for the period of 38 days, at the reasonable rate of $225 per day, the vessel not being in commission, would be the sum of $8,550.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover and its petition is therefore dismissed upon the authority of the case of The Plant Investment Company v. The United States, 45 C. Cls., 374.

27 ### *V. Judgment of the Court.*

At a Court of Claims held in the City of Washington on the second day of May, 1910, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, The New Orleans-Belize Royal Mail and Central American Steamship Company, Limited, be and the same is hereby dismissed.

BY THE COURT.

28 ### *VI. Memorandum on Claimant's Motion for New Trial, Errors of Fact and of Law, and for Amendment of Findings of Fact.*

On July 23, 1910 the claimants filed a motion for new trial, for errors of fact and of law, and for amendment of findings of fact.

On November 3, 1913 this motion was argued by Mr. Serven, in support of the motion, and by Mr. Farrington, in opposition thereto, and the motion was submitted. On November 10, 1913, the Court filed the following order: "Overruled by the Court."

29 *VII. Application for, and Allowance of, Appeal.*

Now comes the claimant in the above entitled cause by its attorney this 26th day of January, 1914, and makes application for an appeal to the Supreme Court of the United States from the judgment therein rendered in favor of the defendant on November 10, 1913 hereby giving notice of such appeal.

SERVEN & JOYCE,
Attorneys for Claimant.

Filed January 26, 1914.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

January 26, 1914.

30 Court of Claims.

No. 22547.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED,

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the judgment of the Court dismissing the petition; of the motion of claimant for a new trial, which was argued by claimants' and defendant's counsel, and which was, on November 10, 1913, finally "overruled by the Court"; of the application of the claimants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 16 day of February, A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,058. Court of Claims. Term No. 365. The New Orleans-Belize Royal Mail and Central American Steamship Company, Limited, appellant, vs. The United States. Filed February 17th, 1914. File No. 24,058.

17

Office Supreme Court, U. S.
FILED
OCT 23 1915
JAMES D. MAHER
CLERK

No. 71.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED, *Appellant*,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

A. R. SERVEN, *Counsel*,
Washington, D. C.

PRESS OF GIBSON BROTHERS, WASHINGTON, D. C.

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AUTHORITIES.

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v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT.

This cause is on appeal from the Court of Claims which held that the S. S. *Stillwater*, under Government charter during the Spanish War in 1898, was not demised by the terms of its charter party to the United States and that the damages suffered by said vessel which were the basis of the proceeding in that court were the result of tortious acts on the part of the military authorities of the United States in requiring said vessel to be used for certain purposes other than those stipulated for in her charter party. The petition was therefore dismissed by the Court of Claims on the authority of the Plant Investment Com-

pany *v.* United States, 45 Ct. Cl. 374. Thereupon the appellant filed its motion for a new trial for errors of fact and of law and for amendment of findings of fact upon assignments of error. After argument thereon the motion was overruled by the Court and an appeal was taken to this Court.

THE FACTS.

The court below found that the S. S. *Stillwater* had lost a lifeboat in landing horses during a storm, when she was also blown on the rocks, after which her propeller would not work for several minutes; she had also been in collision with three other vessels without any serious damage therefrom; that she had been aground on a sand bar; that she had been damaged slightly during an attempt to use her as a lighter for the S. S. *St. Paul*, another Government vessel, and very seriously damaged while being used as a wrecker in rescuing the S. S. *Massachusetts* which was lying fast on the rocks outside the lighthouse at Ponce, Porto Rico, and also while being used for four days as a lighter in unloading stores from the S. S. *Obdam* in the harbor of Ponce, the last two also being Government vessels; that the owner was deprived of the use of the vessel in docking and making the necessary repairs for 38 days; that a reasonable allowance for these damages to the vessel would be $7,532.80; and that damages if allowed at the reasonable rate of $225 per day while the vessel was not in commission would amount to $8,550.

These findings were filed on May 2, 1910. Thereafter, appellant filed its motion for a new trial for errors of fact and of law and for amendment of findings of fact. The errors of fact and of law assigned on which this motion was based were as follows:

ASSIGNMENT OF ERRORS OF FACT.

1. The Court erred in finding that the charter was finally terminated for all purposes by the United States on November 2, 1898.

2. The Court erred in finding the collision with the S. S. *Breakwater* and the damages resulting therefrom.

3. The Court erred in finding the damages to the propeller and loss of the starboard lifeboat in Daiquiri Bay.

4. The Court erred in finding the collision with the S. S. *La Grande Duchesse* and the damages resulting therefrom.

5. The Court erred in finding the collision with the S. S. *Vasco* and the damages resulting therefrom.

6. The Court erred in finding that about Sepetmber 24, 1898, the S. S. *Stillwater* was aground on a sand bar and subsequently developed a hole in the bottom which had to be replaced by a new plate.

7. The Court erred in not finding that the S. S. *Massachusetts* was in imminent peril of destruction when assisted by the S. S. *Stillwater* and that the united efforts of the S. S. *Stillwater* and S. S. *Florida* saved the United States from great loss and damage and possibly the loss of that ship.

8. The Court erred in not finding that claimant asked for the cost of repairing only such damages to the S. S. *Stillwater* as were attributable to the fault of the United States or its agents.

9. The Court erred in finding that the cost of all repairs in their entirety was included in a lump sum instead of being separate according to the provisions of the charter party fixing the liability of each party thereto for certain of these damages.

10. The Court erred in finding that the reasonable allowance for damages to said vessel would be $7,532.52 instead of $10,043.75 as claimed.

11. The Court erred in finding that the reasonable rate per day for the loss of the use of the vessel during the period of such repairs would be $225 instead of $325 as claimed.

12. The Court erred in not finding that both parties understood and treated the charter party as constituting a demise of the vessel, a military officer of the United States being stationed on said vessel and in charge of her.

ASSIGNMENT OF ERRORS OF LAW.

1. The Court erred in not finding that by reason of the contractual obligations arising under paragraphs 4 and 7 of the charter party the United States was liable for all damages directly or indirectly attributable to the fault of the United States or its agents, including the reasonable value of the loss of the use of the ship during the period required to repair such damages, regardless of the question of tort, provided such damages were not by the provisions of the charter expressly imposed upon the claimant, viz., those arising from the proximate causes of marine risk, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers, and breakage of machinery.

2. The Court erred in not applying to this charter party the well-settled rule of construction that a contract must be construed most strongly against the party that prepares it.

3. The Court erred in not finding that the intentions of the parties as to the effect of the charter party were controlling.

4. The Court erred in not finding that the charter party effected a demise of the vessel.

5. The Court erred in finding that the damages resulted from torts of the officers and agents of the United States.

6. The Court erred in not finding that the facts as proven constituted an appropriation of the vessel for which the owners were entitled to full compensation for all damages resulting therefrom, including the loss of the use of the vessel for the full period required for repairing the damages thus inflicted.

After argument this motion was overruled and an appeal was thereupon taken to this Court.

SPECIFICATION OF ERRORS.

(*a*) The appellant submits that the Court below erred in that it did not find that the taking over of the vessel into the Government service and the use made thereof within the stipulations and contemplation of the charter party consisted of such a taking of the entire possession, control, and management of the vessel as to constitute a demise thereof.

(*b*) If such taking of the possession, control, and management of said vessel did not constitute a demise thereof then the Court below erred in not finding that the damages inflicted upon said vessel were such as the appellee was liable for under the express provisions of the charter party.

(*c*) The Court below erred in finding that the military and naval officers of appellee in the performance of their duties as prescribed by the statutes of the United States and the regulations in pursuance thereof committed torts when they employed the said vessel in performing the various services which under the narrow view of this charter party entertained by that Court were held to be beyond the contemplation of the provisions of the charter party although it was perfectly manifest that many similar occasions would, and did in fact arise for the employment of the vessel of the same character as when she finally was badly damaged by the S. S. *Massachusetts* and *Obdam* and that great delays and probable damage would inevitably ensue if the vessel could not under the terms of her charter be freely employed for services exactly similar to that rendered with the S. S. *St. Paul*, the *Obdam*, and the *Massachusetts*.

(*d*) That the Court below erred in finding as a matter of law that appellee was entitled to the benefit of the contractual stipulations under marine insurance policies of "one-third off new for old" in making repairs to damaged vessels covered by marine insurance as was stated by

counsel for appellee in his brief in opposition to the motion for a new trial and amendments to findings of fact and apparently acquiesced in by the Court.

(*e*) The Court below erred in finding that appellee was legally entitled to any deduction in the reasonable value per day for the vessel because of an alleged breach of contract by the appellant where the breach if any was entirely due to the acts of appellee and its agents.

(*f*) The Court below erred in finding that the language added in this case to the charter party involved in the case of Morgan *v.* United States reported in 14 Wallace at page 531 was in effect mere surplusage and that neither this language nor the facts here in any way change or modify the character of the contractual rights or obligations of the parties thereto.

(*g*) The Court erred in the matter of its legal duty in finding the facts by not finding that at all times while said vessel was in the service of the United States both parties to this charter considered and treated said vessel as demised to the United States and also that she was so employed and treated because of the express contractual stipulations of the charter party by which the United States was made responsible for all damages thereto, occasioned by the fault of the United States or its agents.

(*h*) The Court erred in not finding, if the charter party stipulations did not constitute a demise of the vessel and if the express stipulations of the charter party did not make the United States responsible for the damages suffered by said vessel in the attempt to lighter the *St. Paul*, the service as a wrecker in salving the *Massachusetts* when stranded and the lightering of the *Obdam*, that the use of the *Stillwater* for these purposes and the damages resulting therefrom constitute an appropriation thereof for which the owners were entitled to full compensaton for all damages resulting therefrom including the loss of the use of the vessel at a reasonable compensation therefor for the full period required for repairing the damages suffered as a result of such use.

ARGUMENT.

A. Does the Charter Party Constitute a Demise of the Vessel or Is It a Mere Contract of Affreightment?

By the charter party the claimant company *granted* and *let* and the United States *took* "the steamship *Stillwater* for the voyage or voyages hereinafter mentioned, and for such longer time as she may be required in the military service of the United States." She was to go from the Port of New Orleans or elsewhere "to such ports and places as ordered by the proper officer of the Quartermaster's Department" and deliver her cargo in good order and condition (dangers of the seas, etc., being excepted) to the Quartermaster or the duly authorized agent of the Quartermaster's department at the ports to which such vessel was ordered to proceed. The vessel was to be kept by the owner, while in the service of the United States, tight, stanch, etc. The time lost in consequence of any deficiency in these respects and in making repairs to said vessel not attributable to the fault of the United States or its agents was not to be paid for by the United States. The United States was to furnish the fuel necessary for the steamer and to return the steamer in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery excepted. The compensation for the use and service of the *Stillwater* was three hundred and twenty-five dollars a day. All water was agreed to be furnished by the Government, and it was agreed that the vessel be loaded and unloaded at the expense of the Government. The war risk was to be borne by the United States and the marine risk by the owner.

Upon a careful reading of the charter party, it is thus at once seen that the owner gave her over to the Government for the period of the charter party, and that she

was under the complete control and dominion of the Government to sail when and where the Government pleased. The Government had exclusive possession, command and navigation of the vessel for the voyages for which she was hired.

The authorities relating to charter parties are carefully reviewed in United States *v.* Shea, 152 U. S. 178.

In the Shea case the contract provided that Shea furnish to the United States whenever called upon during the year ending June 30, 1887, such vessels of a certain description as might be required to take the place of the vessels then performing service for the United States Army between New York City and Governor's Island. It was further provided that the vessels should have an engineer and fireman and, when required, the remainder of the crew, consisting of a captain and mate, two deck hands and a fireman. The fuel was to be furnished by the Government. The vessels were to be delivered in stanch and first class condition. For the vessels furnished, Shea was to receive sixty-seven dollars per day when employed by the day, and ten dollars per hour when employed by the hour.

Shea furnished a vessel called the *James Bowen*, which was injured in the course of the service. Suit was brought to recover reimbursement for the expense of hiring another vessel while the *Bowen* was laid up for repairs. The Supreme Court, affirming the Court of Claims, held that the vessel was, by the terms of the charter party, *demised* to the United States, and that the United States became, by the terms of the charter party, and were, the owners of the ship during the period for which she was hired.

The charter party in the present case is similar in its nature to the charter party in the Shea case, with the exception that in the present case there is an express and specific demise of the vessel to the United States. By the first Article of the charter party the appellant

"does hereby *grant* and *let* and the said Charles Bird, Major and Quartermaster, U. S. Army, does thereby *take* the steamship *Stillwater* for the voyage or voyages hereinafter mentioned and for such longer time as she may be required in the military service of the United States."

Thus it is seen that the parties were careful deliberately to choose apt and technical words to give the intended effect to the charter party.

But it may be said that inasmuch as the charter party contemplated the owner furnishing the crew, including the captain, and imposed the duty upon the owner of keeping the vessel stanch, strong, etc., and imposed upon the Government the duty of furnishing fuel, an intention is indicated on the part of the parties to the contract that the vessel was not to be demised to the United States nor that the United States was to have the possession, command and navigation of the vessel for the voyage and for the service stipulated.

These objections were raised and answered in the Shea case. In the course of his opinion in that case Mr. Justice Brewer said:

"We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control. If it be said that the clause requiring the Government to furnish fuel was unnecessary in case there was a demise, it may also, in like manner, be said that the further clause as to the petitioner's furnishing a crew was unnecessary if he was to retain the management and control. Any possible inference from one clause may be set off against a different inference from the other, but neither of them destroys the significance of the operative words of transfer, nor outweighs that of the action of the parties in the execution of the contract" (pp. 190–191).

That the vessel *Stillwater* was intended to be given over to the exclusive possession, command and control of the United States is conclusively shown by the conduct of

the parties in the course of the service of the vessel. She was at all times under the immediate command of the Quartermaster of the United States Army or some other military officer of the United States and subject to his orders, and as has been seen from the statement of fact, was specifically ordered by the officers of the United States to do the very things which resulted in the injuries to her. Can it be contended that the United States could have the right to command that the *Stillwater* be used in lightering the *St. Paul* and the *Obdam* and in trying to pull the *Massachusetts* off the rocks outside the harbor of Ponce, unless the vessel were then and there in the "exclusive possession, command and navigation of the United States"?

We will now examine the charter party in detail after considering some general rules for the construction of such instruments.

Chief Justice Tyndal, in the case of Belcher *v.* Capper, 11 Law. J. C. P. 275, says:

"*In each case the whole contract must be taken together, and due effect given to the several clauses which counteract or qualify each other, and thus it often happens that the same expressions will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found.*"

The charter party should receive a liberal construction in order to determine the intention of the parties as they usually contain inaccurate, contradictory and conflicting clauses. (Raymond *v.* Tyson, 17 How. 53, 59; 15 L. ed. 47, 49.)

In American Steel Barge *v.* Cargo of Coal, 107 Fed. Rep. 964, 967, the Court says:

"It is not surprising, therefore, that this charter, like many others, contains phrases, some of which, taken separately, point to one construction, and some to another."

In the charter party involved in that case it was held that one of the most important clauses in support of the demise of the vessel was the provision authorizing the charterer to purchase the vessel at a price fixed in the charter, although the clause contained no stipulation for any credit on such purchase price because of compensation already earned. For this reason the clause in that contract is not so conclusive as to the demise of the vessel as the provisions contained in the charter party now before this Court.

In this connection see New Bedford and New York Steam Propeller Company *v.* United States, 14 Wallace 670, 20 L. ed. 760, where this court held that a charter party almost identical with the one at bar was not a mere contract of affreightment. This seems to qualify the earlier opinion in Morgan *v.* United States, 14 Wallace 531, on which the Court below relied in finding that the present charter did not constitute a demise of the vessel.

STIPULATIONS IN THIS CHARTER PARTY.

1. The owner does "*grant and let*" and the charterer does "*take the Steamship Stillwater*" for such time "*as she may be required in the military service of the United States,*" with the express authority to renew this contract for each successive fiscal year entirely at the charterer's option without regard to the wishes of the owner. (Articles 1 and 13.)

The words used to describe the letting of the vessel are wholly and entirely appropriate to a demise, but decidedly unsuited and inappropriate for use if the contract be intended merely as a hiring of the freight and cabin facilities of the vessel. While such expressions may have been employed in loosely drawn charter parties between traders and shipowners such as are referred to by the Court in Raymond *v.* Tyson, *supra*, as "*an informal instrument,*" the charter party in this case was one pre-

pared with all the formalities that the experience and skill of the War Department officials could devise who have been preparing these contracts for more than a century. It must, therefore, be conceded that the words here employed, viz., "*grant and let*" and "*take*" must have been selected and used to express the exact and deliberate intention of the parties to this contract. Hence they should be accepted as conclusive of the demise of the vessel unless that construction is overwhelmingly refuted by the remainder of the instrument.

When there is added to the effect of the use of these words the further grant to the charterer of the right to retain the vessel in its service for an indefinite term of years, no other conclusion is possible than that this charter party was intended by the parties to convey the full and complete demise of the vessel so long as this contract remained in effect.

2. The vessel is valued at $215,000. If she remains in the service of the charterer until she has earned sufficient compensation to equal this sum, after deducting running expenses, cost of repairs, and an agreed profit on the investment, then said vessel shall become the property of the United States without further payment therefor. If the charterer determines to purchase said vessel before she has earned her fixed value as aforesaid then it shall receive credit for the net compensation already earned by her as part payment on the agreed purchase price of said vessel. (Articles 10 and 11.)

The fixing of a price at which the charterer may purchase the vessel was held in American Steel Barge Co. *v.* Cargo of Coal, referred to above, as one of the most important clauses in favor of a demise of the vessel. In the case at bar the charter not only stipulates for a fixed price if the charterer purchases the vessel but goes much further and provides for credit on such price of the net compensation already accrued. It does not even stop

here but also provides that in the event such net compensation shall amount to the agreed price of the vessel she shall then become the absolute property of the charterer without any further payment therefor. This language has been construed by this Court in the case of New Bedford and New York Steam Propeller Co. *v.* United States, *supra*. This Court in its opening sentence says:

"THE CONTRACT BETWEEN THE PLAINTIFFS AND THE UNITED STATES WAS NOT A MERE CONTRACT OF AFFREIGHTMENT."

The statement of facts as made by Chief Justice Casey in 5 Ct. Cls. 274 shows that the vessel was to be manned, victualed and appareled by the owners who were also to bear the marine risk while the charterers were to bear the war risk exactly as in this charter. On page 275 of the opinion of that Court, the Chief Justice refers more particularly to the case of Spear *v.* United States where the charter-party stipulations are stated more *in extenso*. The Chief Justice in that opinion (5 Ct. Cls. 170) states that "by its terms the vessel was to be kept tight, stanch, and strong, and well and sufficiently manned, victualed, appareled, tackled, ballasted, and furnished in every respect fit for merchant service, at the cost of the owners, pilotage and port charges to be paid by the United States, the war risk to be borne by the United States, the marine risk to be borne by the owners." Hence it is seen that these provisions were absolutely identical with the corresponding stipulations in the charter now under consideration.

If this Court was correct in holding the contract in the Propeller Company case "not a mere contract of affreightment," and affirmed the decision below in that case, then we submit that this charter party must likewise be held "not a mere contract of affreightment." Certainly no

provision would appear to be more inconsistent and contradictory to the idea of a mere contract of affreightment than this stipulation which this Court held actually vested an insurable interest in the United States.

It is, therefore, submitted that regardless of all other provisions of this charter party Articles 10 and 11 alone are sufficiently conclusive to determine that this contract constitutes a demise of the vessel.

3. Charterer's agents are to have absolute and complete authority and control over the use of the vessel within the limits contained in the charter party, viz., the transportation of passengers and cargo. (Article 2.)

In addition to the foregoing and in corroboration of the intention of the demise of the vessel, it must be noted that charterer's agents are to have absolute and complete authority and control over the use of the ship subject only to the limitation in the charter as to the kind of business she was to transact, viz., the transportation of passengers, animals, supplies or cargo. The vessel was stipulated to come and go from and to such ports and places and transport only such cargo as might be desired by the charterer's agents. These provisions of Article 2 in connection with the stipulation for an indefinite term of years of such service can mean only such control and authority over the vessel when fully manned and equipped as must amount to a demise. They are not susceptible of or consistent with any other reasonable interpretation.

4. Charterer is to pay all port charges and pilotage but no monthly wages to any pilot continuously employed by the owners. (Article 5.)

Further corroboration of the demise is thus afforded by this provision concerning the payment of port and pilotage charges by the charterer. This provision must be construed in favor of the demise if it is to be consistent with the other stipulations above referred to. They would certainly not be a proper burden upon the charterer

if the contract was not for a demise of the ship but for a mere contract of affreightment, in which case of course it would be the duty of the owners to bear all such expenses.

5. The charterer is to bear all the cost of loading and unloading the cargo. (Article 8.)

The same construction must also be placed upon the charterer's action in stipulating to pay all the expense of loading and unloading the vessel. If it were a mere contract of hiring, most, if not all, of these expenses would necessarily fall upon the owner. It must be borne in mind throughout this entire matter that these provisions of the charter party necessarily must cover and include all lighterage and other charges of that character.

6. The charterer is to furnish all water for boilers and drinking purposes and all fuel until the vessel is returned to the owners "in the same order as when received, ordinary wear and tear, damage by the elements, collisions at sea and in port, bursting of boilers and breaking of machinery excepted." (Articles 7 and 8.)

As the vessel cannot be operated without fuel and water, of course it is entirely consistent with the demise that the charterer should be obligated to furnish them. Such provisions are especially important here where the vessel was to be turned over to the charterer fully equipped in every other respect to perform immediate service, as provided by Article 4. Were the contract merely one of hiring or affreightment, these two provisions would seem to be inconsistent and inappropriate to the intention of the parties.

7. The charterer is not to pay for time lost on account of the vessel not being kept ready and fit for service or on account of making repairs not attributable to the fault of the charterer or its agents. (Article 4.)

These provisions naturally accompany a contract for the demise of the vessel. They would seem to be equally

unsuited to be contained in a contract of affreightment. Attention is especially called to the latter stipulation. The only repairs that could be attributable to the fault of the charterer or its agents would necessarily come from the abuse of the vessel. If there were no demise the vessel would remain at all times under the absolute control of the owner and consequently the charterer could have no opportunity for such abuse. Hence these provisions would be utterly inconsistent and meaningless unless this charter is construed as a demise of the vessel. In this connection it must be remembered that this contract covered use "in the military service of the United States." That necessarily means that the "supplies or cargo" might without doubt consist of explosives or other dangerous articles. Hence it would be no abuse for the charterer to place on board articles of this character. If the services to be performed under this contract had not been connected with the military service, then the shipping of dangerous cargo might have constituted an abuse by the charterer from which damages might accrue against him, but here such a supposition is impossible. The only damage that could have been contemplated by the term "attributable to the fault of the United States and its agents" was such as was caused to the *Stillwater*, and such as could occur only in case of a demise.

As decided in the Donald Case, 39 Ct. Cls. 357, the wrongful acts of the officers and agents of the United States of the kind committed in this case, which caused damage to the *Stillwater*, are exactly the kind for which the United States is liable. In the concluding paragraph of the opinion in that case, the Court said:

"By proper interpretation of the contract the only repairs the defendant agreed to make were such as were necessary as a result of its own fault, or the negligent acts of the soldiers, or such as might be occasioned by belligerent operations, offensive or defensive."

8. The charterer is to receive the vessel into its service on May 16, 1898, ready and fit and fully equipped in every respect to immediately perform merchant or transport service, and to be so kept while under this contract at the cost and charge of the owner. (Articles 4 and 12.)

It must be noted that the vessel is to be received into the charterer's service in proper condition and properly equipped for performing immediate service. Special attention is called to the words "while in the service of the United States." *Employment* rather than "service" would have been the proper term if this were a mere contract of affreightment.

By Article 7 the vessel is to be "returned" to the owner. This expression could only be proper in case of demise. The use of the word "received" in the same article would also be improper were it not a demise.

Article 8 speaks of the vessel being "retained in" the charterer's service. "For the service of the charterer" and not "in" would be proper were it not a demise.

Article 10 has the words "retained so long in the service of the United States." Article 13 speaks of the vessel as being "in the service of the United States." These are all utterly inconsistent with any construction except that of a demise.

The foregoing with the words "grant and let" and "take" in Article 1 clearly show that this charter contemplates the vessel being taken from the owner's possession into the possession of the United States, retained there for a considerable period, and, perhaps, then returned again to the owner's possession. All of this is totally inconsistent and inappropriate language unless this is a demise.

9. The charterer is to be relieved of the obligations of this charter if the owner transfers or assigns any interest therein, although the charterer reserves all rights of action against the owner for breach of contract. (Article 14.)

When this article is considered in connection with the provisions under which the charterer may apply the net compensation upon the payment of the vessel it becomes exceedingly important as the charterer is the owner against all the world except the other party to the contract. If this is no demise then Article 14 is entirely inapplicable and inappropriate. A contract should be so construed, if possible, that all of its parts may be made effective.

If this charter party be construed as a demise of the vessel then all of the language it contains will be entirely appropriate as here used and all the clauses of the contract will be clearly enforceable and effective. Any other construction must necessarily do gross violence to the language above quoted.

If this be held to be a demise then the appellee will not be put in a position of attempting to avoid its obligations under section 7 of the charter to return the vessel to the owner "in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery accepted.

B. Is the Appellee Liable Because of its Contractual Obligations Regardless of the Question of Demise?

If this charter party does not effect a demise of the vessel, then appellant places its request for recovery for damages and demurrage squarely upon the covenants contained in Articles 4 and 7 of the charter party. It is submitted that appellee broke its covenant when it returned the *Stillwater* in the damaged condition found by the Court below, as such damaged condition was not due to any of the causes for which appellant was made responsible by the provisions of the charter.

The words of Article 4, additional to those of the Morgan case charter, "and in making repairs to said vessel not attributable to the fault of the United States or its agents," were surely not inserted for the purpose of deceiving or misleading appellant. If they have any effect upon the status of the parties here, they must be held to import that appellant will be paid demurrage or rent for its vessel while making repairs attributable to the acts of the appellee and its agents. Article 7 provides for repairs in the covenant to return the vessel in the same order as when received subject to the specified exceptions.

Appellee covenanted to return the vessel in a certain condition, which it has not done. As it has failed in the performance of its agreement it is therefore no matter by what acts of its agents the damages were inflicted. As decided in the Donald Case, *supra*, those acts of the agent of appellee which resulted in the damages in this case were exactly the kind for which the appellee has covenanted by this language to be responsible. The Court says, "by proper interpretation of the contract the only repairs the defendant agreed to make were such as were necessary as a result of its own fault, or the negligent acts of the soldiers, or such as might be occasioned by belligerent operations, offensive or defensive."

The emergencies in in this cass which the activities resulting in the damage were taken, called for the courses followed by the agents of appellee in order to perform their full duty to the Government under the laws and regulations applying to such emergencies. They undeniably did the right thing in this case and thereby accomplished the purpose sought by the appellee, confident that the covenants of the charter would work full justice to the appellant. It is for this Court to say whether appellant shall be thereby irretrievably damaged or shall receive reasonable reimbursement for the injuries inflicted by those acts of the agents of appellee.

If this was not a demise of the vessel the proper rule is laid down in Talbots case, 7 Ct. Cls. 417, 420, 421. As here the injuries were neither "war risk" nor "marine risk," nevertheless the United States was held responsible for them. There they evidently resulted from bad judgment while here they accompanied the exercise of discretion and good judgment on the part of the Government's agents.

C. Did the Officers Perform the Duties Prescribed for them under the Statutes and Regulations Pertaining to such Contingencies?

The Articles of War contained in Section 1342, and the Articles for the Government of the Navy contained in Section 1624 of the United States Revised Statutes, and the regulations in pursuance thereof undoubtedly called for the precise action taken with the *Stillwater* by the military officers of appellee.

Article 15 of the Articles of War provides as follows:

"Any officer who, wilfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service."

Article 8 of the Articles for the Government of the Navy, and sub-article fifteenth thereof provide that:

"Such punishment as a court-martial may adjudge, may be inflicted on any person in the Navy" who "wastes any ammunition, provisions, or other public property, or, having power to prevent it, knowingly permits such waste."

The spirit of the Regulations governing the actions of the officers in cases similar to the one at bar further fortifies this view of the matter.

As these acts were done in the line of their official duty such officers cannot be held to personal responsibility for the damages sustained by the *Stillwater*. If, therefore, the

Court should hold that appellee is not responsible for the damages suffered by her it would result in the taking of private property by the Government for public use without just compensation. The officers did their exact duty under the circumstances. Appellant also performed its whole duty. The appellee received the benefit of the acts of both, which especially in the case of the *Massachusetts* was very great. The price asked is simply the cost of restoring the *Stillwater* to her former condition and compensating her owner for the time lost by reason of repairing those injuries. Justice certainly demands such an interpretation of the charter party as will accomplish that result.

D. If Appellant is Given Judgment for any Amount is the United States Entitled to Settle the Cost of the Repairs on the Basis of One-Third off New for Old?

This proposition is the well-known marine insurance principle which constitutes a very material factor in determining the premiums charged for such insurance. While it is true that this principle is well recognized in all settlements under marine policies of insurance, yet it is purely a contractual stipulation which was not contained in the charter party in this case. The United States has parted with no consideration by reason of which it should be entitled to the benefit of this rule of insurance settlement. The charter party was not a contract of insurance and the United States thereunder was not insuring the appellant to any extent except that it would return the vessel at the end of its term in the military service of the United States in the same order as when received, barring the specific items for which appellant assumed sole responsibility under the charter provisions. Section 7 of the charter party clearly imports that the appellant is to be reimbursed for all expenditures by it necessary to restore

the vessel to such condition at the end of its term of service unless the repairs were occasioned by marine risk, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery. If this Court decides that appellant is entitled to relief then the case should be remanded to the Court below to reconsider this question unless this Court finds that appellee is entitled to the benefit of the insurance provision referred to.

E. Is the Appellee Entitled in the Case of Judgment in Favor of Appellant to Make a Reduction in the Reasonable Value of the Vessel's Services Because She was not Continued in First Class Condition for Service as the Result of the Use to which She was Put by the Appellee's Officers and Agents?

It is a well-settled rule of law that where the breach of a contract occurs from the acts of one of the parties thereto the party primarily responsible for such a breach cannot profit by his own misdoing. The Court below found the per diem value of the ship's services $100 less than the charter price. The motion for new trial and amendment of findings specifically called attention to this reduction and in the argument before that Court as well as in the brief filed in opposition to said motion counsel for appellee assigned the reason for this reduction as the failure of appellant to keep the vessel in good condition and ready for service. The Court did not dissent from this explanation of its reduction in the per diem compensation of the vessel and gave no other reason for such reduction; hence, it should be taken to have acquiesced in that reason. If the judgment is to be awarded to appellant, then this item should be remanded to the Court below for further consideration.

F. Difference Between the Morgan Charter Party and the One at Bar.

The charter parties in the case of Morgan *v.* United States, *supra*, and in this cause are identical with the exception that in the Morgan charter party the last sentence of Section 4 reads, "the time lost in consequence of any deficiency in these respects is not to be paid for by the United States." The same sentence in the present charter party reads as follows: "the time lost in consequence of any deficiency in these respects, and in making repairs to said vessel not attributable to the fault of the United States or its agents, is not to be paid for by the United States." The Court below apparently considered this language of no value whatever in construing the charter party. It is suggested, however, that it must have been introduced there for some purpose, as the sentence before these words were added was perfectly clear, explicit, and positive, importing that the United States was not to pay for any loss of time by the vessel on account of any deficiencies in her condition or equipment. The interpolation of the words quoted seems to fully justify the construction that there was a modification intended of this freedom from liability by the United States, if such deficiency was attributable to the acts of its agents. It is respectfully submitted that this is a material variation from the Morgan charter and must be construed in interpreting the charter in this case. In view of the apparently conflicting opinions of this Court in the Morgan case, *supra*, and in the subsequent decision in the New Bedford and New York Steam Propeller case, *supra*, the language here included in the charter undoubtedly means that the instrument contemplates that the United States will be responsible for just such damages as were inflicted upon the *Stillwater* in the *St. Paul, Massachusetts, and Obdam* incidents, and that, therefore, appellee is liable for these damages under the charter provisions contained in Sections 4 and 7 of this charter party.

G. Should the Court Below have Found the Facts in Regard to the Actions of the Parties to this Agreement at the Time by which to Determine their Views as to its Proper Construction?

The addition of the words to the Morgan charter party as they are found in this charter party may perhaps be ambiguous. The Court below practically held that they had no meaning in the present case. If it be found that they are not mere surplusage in the present case, as they do not seem to be, then it may be granted that the meaning is to some extent ambiguous. In that case actions of the parties should be examined in order to determine what their contemporaneous construction of their own language might be. This principle of law was fully recognized by this Court in Shea *v.* U. S. *supra.*

H. If Appellee is Liable Neither on Account of the Demise of the Vessel nor on Account of its Contractual Obligations, Then was there not Such an Appropriation Thereof for Use in Connection with the St. Paul, Massachusetts and Obdam as to Render Appellee Liable for the Loss Sustained Because of Such Use?

It is true that the *Stillwater* was in the military service at the time she was used to lighter the *St. Paul* and the *Obdam* and to salve the *Massachusetts.* However, if her charter party restricted her from being used for these things then to all intents and purposes as to such use she was not in appellee's service and the acts of the officers which required her to perform these services are exactly similar to what the case would have been if she had not been under Government charter at the time she was so used. It must be perfectly evident from the findings of the Court below that the *Massachusetts* at least was in such imminent danger of destruction with the probable

loss of her cargo as to justify the agent of appellee in charge of her to overrule the written orders of the commanding general and in lieu thereof to require the *Stillwater* to be made fast to her and to endeavor by every means in its ability to rescue her from the dangerous position in which she was situated. Owing to the narrow view of the charter party obligations taken by the Court below this and many other facts which might have been found were omitted from the findings. Evidently the same view was maintained by appellee's agents in regard to the efforts to lighter the *St. Paul* and the *Obdam* in rough water. The damages were so serious resulting from these two experiences of the ship, although the record below showed that she was only momentarily alongside the *St. Paul* for this purpose, as to justify the assumption that these occasions occurred in severe weather sufficiently so to warrant the conclusion that their cargoes were in imminent danger of loss and without any other than like means of being preserved. This Court in United States *v.* Russell, 13 Wallace 623, 20 L. ed. 475, holds that the damage to be averted must be "immediate, imminent and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property, so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war, or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is well proven, is not a trespasser and that the Government is bound to make full compensation to the owner."

The Court also said:

"Such a taking of private property by the Government, when the emergency of the public service in time of war, or impending public danger, is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger as heretofore described is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights under such extreme and imperative circumstances must give way for the time to the public good, but the Government must make full restitution for the service."

The Court further holds that this action results in an implied contract to reimburse the owner for the services rendered and the expenses incurred, and affirms Mitchell *v.* Harmony, 13 How. 115; 14 L. ed. 75.

As has been said the emergencies were of such a character that the agents of the Government could not delay in order to learn whether the vessel was demised or had merely leased her passenger and freight facilities or was otherwise unavailable for this use without the certainty of great loss to the public interest confided to their charge. Therefore they took the only and reasonable course under all the existing circumstances and freely used the vessel to accomplish the imperative needs of the hour which could not be delayed in order to investigate the character of the vessel's status in the military service of the United States. It is therefore submitted that under the findings of the Court below, limited as they are to its theory of the case, this Court can find ample justification if necessary for holding that the use of the vessel for the purposes mentioned was such an appropriation thereof as to require full reimbursement to be made to appellant.

ADDITIONAL AUTHORITIES.

In addition to the authorities heretofore mentioned, attentlon is called to the following cases which the Court may desire to examine in connection with the questions involved in this cause.

DEMISE.

The Aberfoyle, Abb. Adm. 255.
Clarkson *v.* Edes, 4 Cow. 470.
Donahue *v.* Kettel, Fed. Cas. 2980.
Drinkwater *v.* The Spartan, Fed. Cas. 4085.
Gracie *v.* Palmer, 8 Wheat. 605, 15 L. ed. 697.
Holmes *v.* Pavenstedt, 5 Vanf. 100.
Master, etc., of Trinity House *v.* Clark, Maule & S., 288.
Perkins *v.* Hill, Fed. Cas. 10,987.
Pickman *v.* Woods, 6 Pick. 254.
Reed *v.* United States, 11 Wall. 591, 20 L. ed. 220.
Sandeman *v.* Scurr, L. R. 2 Q. B. 86.
Taggart *v.* Loring, 16 Mass. 336.
Vallejo *v.* Hill, Fed. Cas. 10,987.
The Volunteer, 1 Sum. 551.
Webb *v.* Pierce, Fed. Cas. 17,320.

GENERAL CONTRACTUAL LIABILITY.

The Aleppo, 7 Ben. 128.
Alsager *v.* St. Catherine's Dock Co., 11 Mess. & W. 794.
Anderson *v.* Camden, 52 N. J. L. 289.
The Apollon, 9 Wheat. 362, 6 L. ed. 111.
Baltzer *v.* Railroad Co., 115 U. S. 634, 29 L. ed. 505.
Bell *v.* Bruen, 1 How. 169, 11 L. ed. 89.
The Bird of Paradise, 5 Wall. 553, 18 L. ed. 662.
Blanchard *v.* Ely, 21 Wend. 342.
Bradley *v.* W. A. & G. Steam Packet Co., 13 Pet. 89, 10 L. ed. 72.
Brooklyn Life Insurance Co. *v.* Dutcher, 95 U. S. 269, 24 L. ed. 410.

Certain Logs of Mahogany, 2 Sum. 589.
Champion *v.* Colvin, 3 Bing. N. C. 17.
Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. 51, 18 L. ed. 137.
Clark *v.* Insurance Co., 2 Pick. 108.
Clark *v.* United States, 9 Ct. Cl. 387.
The "Conqueror," 166 U. S. 110, 41 L. ed. 937.
Donnell *v.* Amoskeag Mfg. Co., 118 Fed. Rep. 10.
Forbes' Case, 10 Ct. Cl. 248.
Garrison *v.* United States, 7 Wall. 688, 19 L. ed. 277.
Haywood *v.* Tons of Coal, 21 Fed. Rep. 185.
Hunter *v.* Northern Marine, L. R. 13 App. 717.
Kimball *v.* The Anna Kimball, 3 Wall. 43, 18 L. ed. 50.
The Mayflower, 1 Brown Adm. 380.
Mott *v.* United States, 9 Ct. Cl. 257.
The "M. S. Bacon" *v.* Erie Transp. Co., 3 Red. R. 344.
Northwestern Mutual Insurance Co. *v.* Gridley, 100 U. S. 614, 25 L. ed. 746.
Owen *v.* Bushels of Rye, 54 Fed. Rep. 185.
Reybold *v.* United States, 5 Ct. Cl. 284.
The Rhode Island, 2 Blatchf. 114.
Richardson *v.* Winsor, 3 Cliff. 402.
Ruggles *v.* Bucknor, 1 Paine 358.
Sailing Ship "Garston" Co. *v.* Hickie, 15 Q. B. D. 580.
Schultz and Markley *v.* United States, 3 Ct. Cl. 56.
The Stromless, 1 Low. 153.
T. & M. Marine Insurance Co. *v.* Hamilton, L. R. 12 App. Cas. 484.
Topliff *v.* Topliff, 122 U. S. 121, 30 L. ed. 110.
United States *v.* Bevans, 3 Wheat. 336, 48 L. ed 404.
Williamson *v.* Barrett, 13 How. 101, 14 L. ed. 68.

CONCLUSION.

Should this Court find that the charter party constituted a demise of the vessel, or that appellant was entitled to judgment because of the contractual liability of the appellee or because of the doctrine of appropriation, then appellant requests that the case may be remanded to the Court of Claims with instructions that it be reopened there, for the purpose of fixing and apportioning the proper amounts that may be found due the appellant in accordance with the opinion of this Court as to appellee's liability in this matter.

Respectfully submitted,

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Washington, D. C.

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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE NEW ORLEANS-BELIZE ROYAL MAIL and Central American Steamship Company, Limited, appellant,
v.
THE UNITED STATES.
No. 71.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition, without an opinion, on the authority of the case of the *Plant Investment Company* v. *The United States*, 45 C. Cls. 374. The claim grew out of a charter party, wherein the Government sought the service of the steamship *Stillwater* from appellant, a corporation of the State of Louisiana. The charter party was executed during the War with Spain, on May 12, 1898, and was finally terminated on November 2, 1898. The contract (Rec. pp. 1–4) required

that the vessel should, on the 16th day of May, 1898, be ready to load and receive on board at New Orleans, La., or elsewhere, whenever tendered alongside by the quartermaster, United States Army, or his agent, troops, munitions, etc., as he should direct, and should proceed to such ports and places as ordered by the proper officer of the Quartermaster's Department, and there deliver the cargo in good order and condition, dangers of seas, fire, etc., being excepted. All cargo was to be received and delivered within reach of the ship's tackles. It was provided that the vessel should be maintained, while in the service of the United States, in every respect fit for merchant or transport service, at the cost and charge of her owner; that the time lost in consequence of any deficiency in these respects, and in making repairs to said vessel, not attributable to the fault of the United States or its agents, was not to be paid for by the United States.

All port charges and pilotage in and out of different ports for safe navigation in dangerous waters was to be paid by the United States after leaving the port of New Orleans. The war risk was to be borne by the United States and the marine risk by the owner. The United States was to furnish all fuel necessary to propel the vessel until she was returned to the owner at New Orleans, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery excepted. All water to be furnished and all expense of loading and unloading cargo to be borne by the

United States. The contract price was $325 per day for each and every day said vessel was retained in the service of the Government.

The vessel was valued and appraised at $125,000, and it was provided that should she be retained so long in the service of the United States that the amount due and payable thereby, deducting the cost of running and keeping in repair the said vessel, together with a net profit of 33 per cent per annum on the appraised value, should equal said appraised value, the vessel should become the property of the United States without further payment, and that should the United States, during the period of the contract, elect to purchase the vessel, it should have the right to take her at the appraised value at the date of charter, upon the same conditions, and all money then already paid and due on account of said charter should apply on the purchase. Provision was made for extensions of the period of service beyond the time designated in the charter.

On various dates during the period of service the *Stillwater* was injured by collisions and other accidents, some of which occurred while complying with requests of Government officers to perform specific duty and after protests upon the part of the captain of the vessel. (Finding III, pp. 13–15.)

It appears from the findings of fact and the opinion in the *Plant* case, *supra*, that the court dismissed the petition because the charter party was a contract for service and not a demise; that a portion of the damages complained of resulted from the marine risks

expressly assumed by the owner of the ship under the terms of the contract, while the unsegregated remainder of said damages resulted from service not within the charter party, but imposed upon the ship by acts of local Government officials sounding in tort, and therefore not within the jurisdiction of the court.

Appellant's position, in substance, is that the charter party is a demise and not an affreightment, and the Government was, therefore, liable for damages to the vessel while in its possession; that if the charter party was not a demise but merely a contract for service, yet the express terms of the contract made the Government responsible for the alleged damages; that the acts of Government officials requiring the vessel to perform service in connection with the steamships *St. Paul*, *Massachusetts*, and *Obdam* were not tortious but contractual, and, consequently, subjected the Government to the damages claimed; that the court erred respecting the measure of damages which appellant is entitled to recover.

The Government's position is that the charter party was a contract for service, and not a demise, and appellee is not liable for any of the acts causing damages, because they fall either within the terms of the marine risk assumed by appellant under the contract or were tortious acts upon the part of Government officials.

BRIEF OF ARGUMENT.

I. The charter party was a contract for service and not a demise.

II. The Government should not respond in damages, because the acts complained of fall within the terms of the marine risk assumed by appellant under the contract or are tortious acts upon the part of Government officials.

ARGUMENT.

I.

The charter party was a contract for service and not a demise.

In support of its contention that this charter party is a demise of the ship appellant relies mainly upon the case of the *United States* v. *Shea* (152 U. S. 178). This case, however, is in line with the position of the court below, and appellee's contention that the question as to whether a charter party is a demise of the ship or a contract for her service depends upon who has the command, possession, and control of the ship. This is determined by the intentions of the parties and by their acts under their agreement rather than by any technical words used therein.

When the intention of the parties is established matters of detail such as the period of time covered by the contract, the fact that one or other of the parties may furnish fuel or crew, and similar incidents throw no particular light on the question of control.

It is believed that all the questions of law presented by this appeal have been decided adversely

to appellant. This court has held that parties are adjudged to demise or affreight a vessel according to whether they have retained or lost possession and control of it; that a charter party is not regarded by courts as a demise if the intention of the parties can be accomplished otherwise; that in times of war a charter party with the Government for military service, wherein the owner assumes the marine risk while the Government takes the war risk, subjects the owner to such increased or heightened marine risk as may be caused by the exigencies of military service.

In *Reed* v. *United States* (11 Wall. 600, 601) it is said:

> Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership.
>
> Unless the ship herself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner

> for the voyage, as the master, while the owner retains the possession, command, and navigation of the ship, is the agent of the general owner and the mariners are regarded as in his employment and he is responsible for their conduct.

In *Leary* v. *United States* (14 Wall. 611) the court held:

> All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer.

In *Shaw* v. *United States* (93 U. S. 240), the court said:

> So long as the owners retained the possession, command, and management of the steamer, the United States were only charterers of the same upon a contract of affreightment, and liable as such, and were not clothed with the character or responsibility of ownership.

The opinion of Mr. Justice Brewer in *United States* v. *Shea* (152 U. S. 186), relied upon by appellant, quotes with approval the opinion of *Reed* v. *United States, supra,* as follows:

> Courts of justice are not inclined to regard the contract as a demise of the ship if the end

> in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts.

Where, as here, a charter party between a shipowner and the Quartermaster General contemplates service in connection with military operations in time of war, and expressly places the marine risk on the shipowner, with the war risk on the Government, the contract requires the owner to meet all marine risks arising in such service, although they may be greater than marine risks encountered in the usual course of the merchant service, and although he may be required by military exigency to face adverse conditions of sea and weather against his protest and contrary to prudent maritime practice.

In the case of *Reybold* v. *The United States* (5 C. Cls. 283, 284; 15 Wall. 202), under the direction of a United States quartermaster a vessel was sent down the Potomac River at a time of unusual danger from floating ice; and was wrecked. The facts in the case are more fully discussed in the opinion of the lower court, which is therefore quoted:

> The proximate cause of the loss was the ice in the Potomac River, which was a marine risk. This is admitted, but it was contended that the steamer was sent down the river in a

time of danger from the state of the weather by a military order which left her captain no discretion, but imposed on him implicit obedience, and that thus her loss was consequent on the act of the United States.

The loss of the steamer was certainly under a military order, and all her service was to be, as a necessary consequence of the contract in the case. That was made with the Quartermaster's Department of the Army in the time of war, and for its purposes, and therefore necessarily subject to its exigencies. That these would increase the marine risks to which the vessel might be exposed was certain when the contract was made, and this must have been contemplated by the parties and shaped the terms of their contract, and that is to be construed in reference to its circumstances; and then the term "marine risks" means necessarily the marine risks incident to the service in which she was to be employed, and that was military service in time of war, involving necessarily military exigencies and orders; submission to these, therefore, was the thing contracted for by the owners and for which they were paid.

In the case of *Donald* v. *The United States* (39 C. Cls. 373, 374), where a vessel chartered to carry water for the troops and fleet in the Spanish War was damaged while delivering water to transports at sea in rough weather, just as the *Stillwater* was injured while lightering vessels at sea, the court held:

Nothing is said in the stipulations of the contract that water should be delivered in the

> calm of the sea or in harbors or port shelters. If such a stipulation had been contained in the contract, we can well see how in the exigencies of war and wave the objects of the contract could have been wholly defeated, and the troops on the transports deprived of the use of the water provided for their necessities. It will be presumed that such a stipulation was designedly omitted, and, that being true, it follows that it was the intention of the parties that the water was to be delivered as it was, although attended with risks imposed by a choppy sea. Plaintiff, by the express stipulation of his contract, assumed marine risks, and that burden should be considered in the light of the service to be performed, including the danger incident to the delivery of water to the transports at any place directed by the proper officer. The defendants assumed only war risk, and there can be no just pretense that the injury to plaintiff's ship was incident to any act of war.

In the case of *Reed* v. *The United States* (11 Wall. 600, 601, supra), the owner of a steamer was ordered by the Quartermaster General in time of war to prepare her, under pain of impressment, to transport a cargo to a particular place, to which order the owner protested because the condition of water and the lateness of the season made it impracticable to perform the voyage, yet the owner thereafter attempted the voyage under the per diem compensation named by the Quartermaster in his first communication. The vessel was lost and it was held by the

court that the Government was not the owner of the vessel for the voyage or an insurer of her safety:

> Although the plaintiffs objected to the order of the Quartermaster at the time it was given, still it is quite evident that they ultimately consented to perform the service as matter of contract, and that they were content to receive the per diem compensation fixed by the Assistant Quartermaster at the time he gave the order. * * * Compulsion is not set up by the plaintiffs, and if it was the theory could not be supported, as the jurisdiction of the Court of Claims does not extend to torts. * * *
>
> By the terms of the contract they were to carry the cargo of military supplies from the port of St. Louis up the Missouri River to Fort Berthold for $272 per day during the voyage, including the return trip as well as the trip to the place of destination, in full compensation for the entire services. By necessary implication the plaintiffs were to victual and man the steamboat and keep her in a seaworthy condition, and in contemplation of law they retained the possession, control, and navigation of the steamboat, as the master was one of their own selection and the crew were in their own employment, and they were responsible for their conduct. Steamers require fuel as a means of creating motive power, and it is quite obvious that it was the duty of the plaintiffs to supply the steamboat with fuel for that purpose, as well as provisions for the officers and crew,

> and that the master was their agent and not the agent of the charterers. Well-founded doubts can not be entertained upon that subject, and if those conclusions of fact are correct, then it follows as a conclusion of law that the plaintiffs, as the general owners of the steamboat, were also the owners for the voyage, and that the true relation of the United States to the adventure was that of a charterer for hire and shipper of the cargo.

In the case of *Morgan* v. *United States* (14 Wall. 531) this court was called upon to consider a situation very similar to this case, including even the appearance of hardship upon the claimant resulting from the statutory limitations on the jurisdiction of the Court of Claims.

There, as here, a vessel was chartered by the Quartermaster General for service in time of war, and was required to perform service in attempting to leave a harbor at a time of obvious danger resulting from low water and high wind, in which attempt she was damaged. But since the damage complained of was caused by a stranding of the ship, and was consequently due to a marine risk assumed by her owners under the charter party, this court declined to go behind the marine risk to consider the military exigency which required the attempt to be made when it was. The court said (pp. 534, 535):

> The stipulations in the contract applicable to this subject leave no room for doubt how the question should be answered. The United

States, being in a state of war, found it necessary to hire the injured vessel for the purpose of transporting troops and munitions of war to different ports and places, and entered into a contract with her owners to carry this purpose into effect. The vessel was to be officered and manned by the owners, who agreed at all times to keep her in repair and fit for the service in which she was engaged. In no sense were the United States the owners of the vessel, for they had nothing to do with her management, and only reserved to themselves the right to say how she should be loaded and where she should go. In the condition of things then existing it became necessary to make provision for two classes of perils. This was done, the United States assuming the war risk, while the owners of the boat agreed to bear the marine risk. If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners, and not the Government, must bear the loss. That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule "*causa proxima non remota spectatur*" we can not proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel. If it did, it was known to the owners when the charter party was formed, who, with this knowledge, became their own insurers against the usual sea risks, and must abide the consequences of their stipulation.

> There is a certain degree of hardship in this case growing out of the peremptory order of the Quartermaster to proceed to sea, but this is outside of the contract, and, if worthy of being considered at all, must be addressed to another department of the Government.

The facts in the present case bring it squarely within the law as above stated, for this contract found the *Stillwater* in the harbor of New Orleans in the possession, control, and command of Capt. Galt, the owner's agent, in whose command she remained until he was superseded by Capt. Stevenson, another agent of the owner, who remained in command until the contract was terminated. (Rec. pp. 4, 10.)

The contract required the ship to be ready on a day certain, to load and receive at New Orleans or elsewhere only such persons as should be tendered alongside and only such cargo as should be placed within reach of her tackles by the quartermaster, and to proceed therewith to such ports and places as he might designate, there to deliver them to his representatives.

Throughout the term of this contract the ship was to be manned, victualed, furnished, and maintained by her owner, who was to bear the marine risk, while the Government took the war risk. (Rec. p. 2.)

It was clearly the purpose and intention of this contract to secure the service of the ship as an instrument of transportation in the possession, control, and command of her owner, but confined to the exclusive use of the Quartermaster General and his representatives.

This intention of the contract was carried out and executed by the parties, except in so far as the contractual rights of the ship may have been invaded by the local officers of the Government in the services required of her in connection with the steamships *St. Paul*, *Massachusetts*, and *Obdam*. (Rec. pp. 4–7, 14, and 15.) On each of these occasions the *Stillwater* was ordered by a local official to perform a service; in each case her captain protested because of the nature of the service required or because of the conditions of wind and sea prevailing at the time; but in each case the service was rendered by the ship while in the possession, control, and command of the captain, and her time and service paid for under the contract.

Consequently, these three incidents, whatever else may be said of them, since they did not change the possession, control, or command of the ship, can not operate to change her legal status under this contract, which is determined by her possession, control, and command.

But, over against the foregoing considerations, appellant particularly contends that the use of the words "grant," "let," and "take" in the first paragraph of this charter party, being technical words of frequent application in instruments of demise, must be held to constitute this contract a demise. But this contention is silenced by the opinion of Chief Justice Marshall in *Hooe* v. *Groverman* (1 Cranch, 214), where almost the same words are considered, and which opinion is quoted with approval

by this court in *United States* v. *Shea, supra,* so much relied upon by the appellant.

Appellant further contends that because this charter party gives the Government the right to buy the ship at a stated price and on given terms at any time during the continuance of the charter, the contract must be treated as a demise of the ship, on the authority of *Propeller Co.* v. *United States* (14 Wall. 607). But in that case the ship was lost by a risk of war, and the issue concerned the price that should be paid for her by the Government in view of its option to purchase.

The contention of the appellant here entirely ignores the true test of the question under consideration, which is, Who has possession, control, and command of the ship? And it can not be that the legal status of the vessel, and the rights of the parties to the contract as it was performed, are to be changed or controlled by an option to purchase given to the Government by a secondary provision of the contract, and which option the Government elected not to exercise.

Since the contract was performed and the transaction was closed without bringing into operation the optional provision of the contract regarding the purchase of the ship, which option expired with the charter, its mere presence in the paper can not now be invoked to change the legal situation resulting from the performance of the contract and the termination of the charter.

It is submitted that this charter party is a contract for service and not a demise of the ship, and therefore

it is maintained that it is not incumbent upon appellee to return the ship in the same order as when received, if the alleged damage occurred within the purview of the marine risk clause.

II.

The Government should not respond in damages, because the acts complained of fall within the terms of the marine risk assumed by appellant under the contract, or are tortious acts upon the part of Government officials.

The theory of liability discussed by appellant under the above head on pages 18–20 of its brief is based upon Articles IV and VII of the charter party, to be found on pages 2 and 3 of the record. Article IV provides that the vessel shall be manned, equipped, and maintained during the charter by her owners, while Article VII provides that the United States shall furnish propelling fuel during the charter, and at the termination thereof shall return the steamer to her owners at New Orleans in the same order as when received, ordinary wear and tear, damage by the elements, collision, bursting of boilers, and breakage of machinery excepted.

But in this discussion appellant overlooks the provisions of the intervening Article VI, which expressly places the marine risk of the service on the owner of the ship, and all the damages complained of in the case clearly fall within the marine risk contemplated by the contract, with the possible exception of the damage alleged to have resulted from the effort of the *Stillwater* to pull the *Massachusetts* off

the rocks where she was stranded, which matter will be discussed hereafter. (Rec. pp. 5, 14.)

Aside from the damages alleged to have been received in attempting to pull the *Massachusetts* off the rocks, the damages to the *Stillwater* as found by the Court of Claims were caused by a collision with the steamship *Breakwater* in Tampa Bay in the month of June, 1898; by grounding in Daiquiri Bay three weeks later during a gale; by collision with the steamship *Grand Duchesse* in Gauanica Bay on July 27; by lying alongside the steamship *St. Paul* at Arroyo on August 3, 1898, when both vessels were rolling in a heavy sea; by collision with a bulwark port of the steamship *Massachusetts* August 4; by lying alongside the *Obdam* in the harbor of Ponce from August 27 to August 31, during which time both ships rolled and the *Stillwater* thumped heavily; by collision with the steamer *Vasco* at Ponce on September 3; and by grounding on a sand bar about three weeks after the collision with the *Vasco*. (Rec. pp. 14, 15.)

All of these damages resulting from collisions and groundings and the play of one ship against another while lightering at sea are clearly due to marine risks of a character obviously to be expected by a transport and freight boat engaged for service with a large fleet in a military expedition to the island of Cuba. And although on two specific occasions of short duration in a service covering six months, namely, the incidents with the *St. Paul* and the *Obdam*, the captain protested against the service required under the weather

conditions then prevailing, it is clear that he subsequently performed the service and was paid for it under the contract.

From the authorities previously cited it is also clear that the service so protested against was within the scope of the contract.

If the captain thought otherwise, he at all times had the right, open to any party to any contract, of refusing to perform the service required under the possible penalty of losing his contractual compensation, with an unquestionable right to get his remedy in the Court of Claims if his interpretation of the contract should be found correct and that of the Government wrong.

But the damage to the *Stillwater* caused by her effort to float the *Massachusetts* (Rec. pp. 5, 14) presents a different question, for in both the *St. Paul* and *Obdam* incidents the character of the service required and the order to perform it came within the purview of the contract, because the service was transportation of freight, and the order to move it came from the quartermaster or his representatives.

In the *Massachusetts* incident the quartermaster ordered the captain of the *Stillwater* to take on 25 laborers, proceed to the *Massachusetts*, load his ship from the *Massachusetts*, and return as near shore as possible. (Rec. pp. 5, 14.) In obedience to this order the captain of the *Stillwater* proceeded to the *Massachusetts*, where he was ordered by a naval officer in charge to make fast to the *Massachusetts* and assist in pulling her off the rocks, which order

he obeyed under protest. Subsequently, when he was ordered to leave the *Massachusetts*, the *Stillwater* came into collision with a bulwark port of the *Massachusetts* "carelessly and negligently left open," as alleged in the petition (Rec. p. 5) and which allegation clearly sounds in tort.

The terms of the charter party were between the shipowner and the Quartermaster General, and required the ship to take orders from, and perform service for, the Quartermaster General and his representatives, but not to take orders from naval officers or to perform service for the Navy Department. When the naval officer in command of the *Massachusetts* procured the services of the *Stillwater* in the effort to float the *Massachusetts* he was not acting under this charter party, and could not act thereunder.

His acts disregarded the orders of the Quartermaster General's representative under which the *Stillwater* was present, and invaded the contractual rights of both parties to the charter, and consequently they were tortious in respect of those parties.

Being tortious, they can create no right enforceable by the limited jurisdiction of the Court of Claims.

> *Gibbons* v. *United States*, 8 Wall. 269.
> *Reed* v. *United States*, 11 Wall. 591.
> *Morgan* v. *United States*, 14 Wall. 531.
> *United States* v. *Schillinger*, 155 U. S. 167.

But appellant contends on pages 20 and 21 of its brief that since the Articles of War and the Articles for the Government of the Navy prohibit naval offi-

cers from wasting Government property, the naval officer in charge of the *Massachusetts* was required to procure the assistance of the *Stillwater* to save the *Massachusetts*.

While considerations of this character might very properly be addressed to Congress in support of an application for legislative compensation, it can hardly be seriously contended here that the statutory jurisdiction of the Court of Claims can be enlarged by the Articles for the Government of the Navy.

Appellant contends that the *Massachusetts* incident constituted an impressment or appropriation of the *Stillwater* under circumstances raising an implied contract to pay for the services rendered.

The record reveals no facts supporting the theory of impressment or appropriation except that the captain of the *Stillwater* protested against the wrecking service before performing it.

If the acts constituting the alleged impressment or appropriation sound in tort there can be no jurisdiction thereof in the Court of Claims, while if they sound in contract and raise an implied agreement cognizable in that court, such agreement can be only for reasonable compensation for the service rendered as on a quantum meruit.

But such compensation has already been made by the payment of the per diem wages of the ship during the period that she was employed with the *Massachusetts*.

The *Massachusetts* incident occurred on the 4th of August, 1898, while the owners have been paid for

the time and services of the ship from May 16 to November 2, 1898, at the per diem rate of the charter party, and since that instrument fixes the rate for an indefinite period at the option of the Government, it may fairly be taken as a reasonable rate of compensation for her time and service upon a quantum meruit.

But appellant appears to contend that the implied contract of the so-called impressment or appropriation covers damages as well as compensation, and having received compensation on the discharge of the ship from the service, it now sues for damages alleged to have been suffered in the course thereof.

In support of this contention the appellant relies entirely on *Russell* v. *United States* (13 Wall. 622), but the opinion in that case (at p. 632) expressly states that nothing was there claimed by way of damages.

Under the authorities in this court and the facts in this record it is maintained that no impressment or appropriation of the *Stillwater* occurred, and that no implied contract within the jurisdiction of the Court of Claims arose in the transaction. While differences of opinion developed in the course of the charter and while the captain of the *Stillwater* protested against three items of work required of him in six months of service yet all of that service was finally performed under the charter party and was paid for thereunder. Consequently the law of the charter must govern the rights and responsibilities of the parties in this proceeding. If that law or appellants' rights thereunder were

invaded by local government officials in the *Massachusetts* incident or otherwise, their acts were tortious and not cognizable under the limited jurisdiction of the Court of Claims.

Reed v. *United States*, 11 Wall. 591
United States v. *Kimbal*, 13 Wall. 636
Morgan v. *United States*, 14 Wall. 531
Reybold v. *United States*, 15 Wall. 202.

Appellant also raises several questions respecting the measure of damages, if the judgment of the Court of Claims should be reversed, but it is deemed unnecessary to discuss these questions at this time in view of appellant's request that if a reversal is ordered the case may be reopened in the Court of Claims for an apportionment of the damages.

The case was presented in that court upon the theory that the charter party was a demise of the ship, and consequently that all damages suffered during the term thereof were recoverable as a whole without separating and itemizing the damages in relation to the several accidents or mishaps.

CONCLUSION.

It is respectfully submitted that the decision of the lower court should be affirmed.

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NEW ORLEANS-BELIZE ROYAL MAIL AND CENTRAL AMERICAN STEAMSHIP COMPANY, LIMITED, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 71. Argued November 11, 1915.—Decided November 29, 1915.

Under the charter party in this case, the United States did not so become the owner of the vessel *pro hac vice* as to be liable for injuries during the term of the charter and for demurrage thereafter during period of repair.

The charterer of a vessel does not become owner *pro hac vice* where the control, as in this case, remains with the general owner, even though the direction in which the vessel proceeds is determined by the charterer.

Authority to direct the course of a third person's servant does not prevent his remaining the servant of that third person.

The United States in this case, *held* not to be liable for damages to a vessel under charter due approximately to marine risk. *Morgan* v. *United States*, 14 Wall. 531, followed; *United States* v. *Shea*, 152 U. S. 178, distinguished.

The United States in this case, *held* not liable for damages sustained by a vessel under charter to it when rendering services in aid of another vessel belonging to the United States.

The fact that this case is a hard one does not make the United States legally responsible for the injuries sustained by a vessel during the period chartered. *United States* v. *Russell*, 13 Wall. 623, distinguished.

THE facts, which involve the liability of the United States for injuries to, and demurrage on, a vessel under charter to the Government, are stated in the opinion.

Mr. A. R. Serven for appellant.

Mr. Assistant Attorney General Thompson, with whom

Mr. William Heitz was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for injuries to the steamship Stillwater while under charter to the United States from May 16, 1898, to November 3, 1898, and for demurrage from November 2 to December 14, 1898, while the vessel was undergoing repairs. It was rejected by the Court of Claims on the authority of *Plant Investment Co.* v. *United States*, 45 C. Cls. 374.

The injuries were caused as follows: First, in June, 1898, there was a collision with another steamship in Tampa Bay, it does not appear by whose fault. Three weeks later the Stillwater was driven against the rocks while unloading horses in Daiquiri Bay, Cuba, during a gale, with other incidental damage. On July 27, in Gauanica Bay, Porto Rico, there was another collision with a steamer. On August 3, in obedience to orders against which the captain protested, the Stillwater assisted in lightering the United States auxiliary cruiser St. Paul, at Arroyo, Porto Rico, and while lying alongside the St. Paul in rough water, was damaged by the after gun sponson of the St. Paul being thrown down upon it. On August 4, in obedience to orders from the naval lieutenant in charge, against the protest of the captain, the Stillwater was made fast to the Massachusetts, then on the rocks at Ponce, Porto Rico, and attempted to pull it off. The weather was rough, and in consequence of rolling against the Massachusetts and otherwise the Stillwater was damaged and strained. On August 26, in obedience to orders and against the protest of the captain, the Stillwater was placed alongside the Obdam, in the harbor of Ponce, for the transfer of commissary stores from the latter to her. The ships both rolled and the Stillwater

thumped heavily, and was badly injured. On September 3, at Ponce, the Spanish steamship Vasco ran into the Stillwater in the night time doing some damage, and finally, about three weeks later, the Stillwater went aground on a sand bar and a hole afterwards was found in her bottom. The bill for the repairing of the Stillwater was rendered in a lump sum, showing only the cost as a whole.

By the charter party made on May 12, 1908, Art. I, the claimant "does hereby grant and let" and a Quartermaster of the Army "does hereby take" the vessel for the voyages specified, "and for such longer time as she may be required in the military service of the United States, not to extend beyond" June 30, 1898, unless the charter shall be renewed. II. "The said vessel shall on the 16th day of May, eighteen hundred and ninety-eight, be ready to load and receive on board at New Orleans, La., or elsewhere, whenever tendered alongside, by the Quartermaster, United States Army, or his agent, only such troops, persons, animals, and supplies or cargo as he shall order and direct, and as the said vessel can conveniently stow and carry," reserving room for the vessel's cables and materials, for officers and crew, and for the necessary coal; and when so laden is to deliver the cargo at such port as the Quartermaster's Department may direct, "in good order and condition (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted)." IV. "The said vessel now is, and shall be kept and maintained while in the service of the United States, tight, stanch, strong, and well and sufficiently manned, victualed, tackled, appareled, and ballasted, and furnished in every respect fit for merchant or transport service, at the cost and charge of her owner. The time lost in consequence of any deficiency in these respects, and in making repairs to said vessel not attributable to the fault of the United States or

its agents, is not to be paid for by the United States." V. All port charges and pilotage after leaving New Orleans will be paid by the United States but not the wages of any person employed by the claimant continuously on the vessel as pilot. VI. "The war risk shall be borne by the United States; the marine risk by the owner." VII. The United States is to furnish fuel "until the said vessel is returned to the said Company at New Orleans, La., in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery excepted." VIII. All water is to be furnished by the Government, and all cargo loaded and unloaded at its expense. X. The vessel is valued at $125,000, and if retained in the service of the United States so long that the money paid under the charter (less the cost of running and keeping in repair and a net profit of 33 per cent. on the appraised value), is equal to the appraised value, the vessel is to become the property of the United States without further payment except what then may be due for services under the charter. XI. The United States also, during the charter, may purchase the vessel at its appraised value, with a similar clause for deductions. In XIII and XIV there are provisions for renewal and against a transfer of the contract or any interest therein by the claimant. These, we believe, are all the portions of the charter party material to the present case.

The main contest is upon the question whether by this contract the United States became owner *pro hac vice*, as affecting the extent of the liability assumed. The claimant relies upon the words 'grant and let' on the one side and 'take' on the other, the fixing of the price at which the United States may purchase the vessel, the reference to the vessel being 'returned,' the contemplation that the need of repairs may be attributable to the fault of the United States, the control of the United

States over the destination of the ship, and some details, as showing that the United States was in the place of the owner for the time. But we cannot accept this conclusion. The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received. It agreed to deliver the cargo in good condition, dangers of the sea &c. excepted. It assumed the marine risk. We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. *Little* v. *Hackett*, 116 U. S. 366. *Reybold* v. *United States*, 15 Wall. 202. We conclude that the possession followed the navigation and control. The case resembles *Morgan* v. *United States*, 14 Wall. 531, not *United States* v. *Shea*, 152 U. S. 178, as in the latter it was found that the vessel was under the exclusive management and control of the Quartermaster's Department. See further *Hooe* v. *Groverman*, 1 Cranch, 214, 237. *Reed* v. *United States*, 11 Wall. 591.

The claimant contends, however, that if the ship was not demised, the United States is liable under articles IV and VII for not returning the ship in the same order as when received, and for demurrage due to repairs attributable, as it is contended these were, to the fault of the United States. The damage, however, for the most part was due proximately to marine risks, which the claimant assumed. *Morgan* v. *United States*, 14 Wall. 531. The demurrage accrued after November 2, the date on which it is found that the charter was ended. How much of it was due to damage from marine risks does not appear. The service in aid of the Massachusetts and others outside the contract, if any, imposed no liability upon the

United States. *United States* v. *Kimbal*, 13 Wall. 636. *Reybold* v. *United States*, 15 Wall. 202. *Schillinger* v. *United States*, 155 U. S. 163. *Harley* v. *United States*, 198 U. S. 229, 234. *Peabody* v. *United States*, 231 U. S. 530, 539. We see no ground except the impression that this is a hard case to apply the principle of *United States* v. *Russell*, 13 Wall. 623.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.